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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 THOMAS HARRIS,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting
14 Commissioner of the Social Security
Administration,

15 Defendant.
16

CASE NO. 13-cv-05864 JRC

AMENDED ORDER ON
PLAINTIFF'S COMPLAINT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
19 Magistrate Judge and Consent Form, ECF No. 5; Consent to Proceed Before a United
20 States Magistrate Judge, ECF No. 6). This matter is before the Court on plaintiff's
21 Motion and Brief in Support of Motion to Alter or Amend Judgment (ECF No. 21; *see*
22 *also* ECF Nos. 22, 23).
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1 Because the Court agrees that the ALJ's finding that plaintiff was disabled as of
2 March 21, 2011 was not challenged by plaintiff, in whose favor the finding was made,
3 and that this finding also was not revisited by defendant in the sixty days following the
4 ALJ's decision, the Court herein concludes that the ALJ's finding that plaintiff was
5 disabled at least as of March 21, 2011 may not be revisited by the Administration
6 following remand of this matter.

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8 As determined previously, and as conceded by defendant, the ALJ "in this case
9 committed harmful legal error" by failing to call a medical expert to determine the exact
10 date of disability onset (*see* ECF No. 17, 19). Therefore, this matter still must be reversed
11 and remanded pursuant to sentence four of 42 U.S.C. § 405(g) for further consideration
12 on the limited question of whether or not plaintiff became disabled prior to March 21,
13 2011.

14 **BACKGROUND AND PROCEDURAL HISTORY**

15 Plaintiff initially filed an application for Title II benefits on January 20, 2009 (Tr.
16 222). At the time of his first hearing on February 24, 2011, before Administrative Law
17 Judge Wayne N. Araki ("the ALJ") (Tr. 31-54), the ALJ continued the hearing to allow
18 plaintiff to file a Title XVI application (Tr. 52-53, 199). On March 7, 2011, plaintiff sent
19 his Title XVI application to ODAR (Tr. 199-220). The second hearing occurred on July
20 7, 2011 (Tr. 55-94).

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22 In his September 9, 2011 written decision, the ALJ determined that plaintiff's
23 residual functional capacity prior to March 21, 2011 was that plaintiff could perform a
24 full range of light work as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b) (Tr. 14).

1 The ALJ then found that beginning March 21, 2011, the date that his Title XVI
2 application was filed, but not before then, due to the residual effects of pain and the side
3 effects of medication, plaintiff was unable to work eight hours a day, five days a week
4 (Tr. 15, 7-22). The ALJ failed to call a medical expert to testify as to the date of disability
5 onset.

6 Following this partially favorable decision by the ALJ, plaintiff filed a complaint
7 in this Court (*see* ECF Nos. 1, 3, 16, 19). In plaintiff's Opening Brief, plaintiff raises the
8 following issues: (1) Whether or not the Commissioner properly determined plaintiff's
9 protective filing date to be March 21, 2011; (2) Whether or not the ALJ properly
10 developed the record; and (3) Whether or not the ALJ properly found plaintiff not
11 credible prior to March 21, 2011 (*see* ECF No. 16, p. 1). Plaintiff "did not challenge the
12 ALJ's RFC," and "[t]here was no challenge to the adequacy of the finding that he was
13 disabled in March 2011" (*see* ECF No. 21, p. 5; ECF No. 23, p. 6).

15 In response, defendant conceded that "the administrative law judge (ALJ) in this
16 case committed harmful legal error" (*see* ECF No. 17, p. 1). Defendant admitted that
17 "remand is necessary for the ALJ to call an ME to infer the date of onset of disability"
18 (*see id.*, p. 2). This Court agreed, and on June 24, 2014, the Court issued an Order
19 vacating the ALJ's decision in its entirety, and reversing and remanding this matter to the
20 Acting Commissioner for further administrative proceedings (ECF No. 19).

21 On July 22, 2014, plaintiff filed a motion to alter or amend the judgment, and brief
22 in support (*see* ECF No. 21). Plaintiff requests that the Court enter an amended Order and
23 Judgment with a conclusion that the ALJ's finding that plaintiff was disabled at least as
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1 of March 21, 2011 had not been challenged by either party and hence, cannot be revisited
 2 by the Acting Commissioner on remand. Defendant filed a Response arguing that the
 3 Court did not err and that no manifest injustice has occurred (*see* ECF No. 22). Plaintiff
 4 has filed a reply (*see* ECF No. 23).

5 STANDARD

6 According to the Ninth Circuit:

7 Under Federal Rule of Civil Procedure 59(e), a party may move to have
 8 the court amend its judgment within 28 days after entry of judgment.

9 “Since specific grounds for a motion to amend or alter are not listed in
 10 the rule, the District Court enjoys considerable discretion in granting or
 11 denying the motion.” *McDonnell v. Calderon*, 197 F.3d 1253, 1255 n.1
 12 (9th Cir. 1999) (en banc) (per curiam) (internal quotation marks
 13 omitted). But amending a judgment after its entry remains “an
 14 extraordinary remedy which should be used sparingly.” *Id.* (internal
 15 quotation marks omitted). In general, there are four basic grounds upon
 16 which a Rule 59(e) motion may be granted: (1) if such motion is
 17 necessary to correct manifest errors of law or fact upon which the
 18 judgment rests; (2) if such motion is necessary to present newly
 19 discovered a previously unavailable evidence; (3) if such motion is
 20 necessary to prevent manifest injustice; or (4) if the amendment is
 21 justified by an intervening change in controlling law. *Id.*

22 *Allstate Insurance Co v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (*citing McDonnell*
 23 *v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam) (*citing* 11
 24 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995))). The
 Ninth Circuit noted that these four enumerated grounds on which a Rule 59(e) motion
 may be granted are not exclusive, further noting that an amendment reflecting a “purely
 clerical task of incorporating undisputed facts into the judgment” is an appropriate

1 ground for a Rule 59(e) amendment. *Id.* (citing *McDonnell, supra*, 197 F.3d at 1255;
 2 *Molnar v. United Techs. Otis Elevator*, 37 F.3d 335, 337-38 (7th Cir. 1994)).

3 DISCUSSION

4 **1. Whether or not the ALJ's finding that plaintiff was disabled as of March 21,** 5 **2011 can be revisited by the Administration following remand of this matter.**

6 First, the Court notes that plaintiff is not challenging "the decision made in his
 7 favor, but rather he argues the form of the Order leaves open for further adjudication a
 8 period of time and issues previously decided in plaintiff's favor which were not and could
 9 not be challenged" (*see* Reply, ECF No. 23, p. 2). Therefore, the Court is not persuaded
 10 by defendant's argument that plaintiff lacks standing to challenge this aspect of the
 11 Court's Order (*see* Response, ECF No. 22, p. 2).

12 Regarding the main contention in plaintiff's motion to amend, the issue as
 13 discussed herein is whether or not the Court erred in concluding that the Acting
 14 Commissioner was free following remand of this matter to revisit the finding favorable to
 15 plaintiff that plaintiff was disabled as of March 21, 2011. The Court notes that although
 16 amending a judgment after its entry is an extraordinary remedy to be used sparingly, the
 17 Court nevertheless "enjoys considerable discretion in granting or denying the motion."
 18 *Allstate, supra*, 634 F.3d at 1111 (citing *McDonnell, supra*, 197 F.3d at 1255 n.1). In this
 19 matter, as discussed further below, the Court concludes that plaintiff's motion shall be
 20 granted to correct a manifest error of law on which the judgment rests. *See id.*

22 Plaintiff cites *Allstate Ins. Co. supra*, 634 F.3d at 1112, in support of his argument
 23 that a clear error of law "includes determination of issues outside those raised for
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determination” (ECF No. 21, pp. 2-3). In support of his motion, plaintiff also cites *Alvarez v. Astrue*, 2010 WL 3894646, 2010 U.S. Dist. LEXIS 104314 (C.D. Cal. 2010) (unpublished opinion); *see also Boyd v. Astrue*, 2011 U.S. Dist. LEXIS 99468 at *7 (W.D. Wash. 2011) (“the ALJ was thus not authorized to reevaluate this impairment at step two. The remand order did not throw open the doors for a reassessment on all impairments at step two”) (unpublished opinion).

In *Alvarez*, following remand from the district court, the ALJ “without explanation, altered his prior RFC assessment in a manner unfavorable to plaintiff, *i.e.*, the ALJ omitted certain manipulation limitations he previously had found to be supported by the evidence of record.” *Alvarez, supra*, 2010 U.S. Dist. LEXIS 104314 at *7. The *Alvarez* court noted that the “limitations found by the ALJ in his [earlier] decision that favored plaintiff were not appealed,” and were not disturbed by the court’s remand order. *Id.* at *21 (*quoting Calderon v. Astrue*, 683 F.Supp.2d 273, 276-77 (E.D.N.Y. 2010)). When adopting the reasoning and rationale of the discussed district court cases, the court quoted *Calderon* favorably, noting that it, and the other cases discussed, “persuasively explain why the law of the case and law of mandate doctrines should apply in the Social Security context, and the [c]ourt agrees with, and adopts, their reasoning and rationales.” *Id.* at *17-*18 (*quoting Calderon, supra*, 683 F.Supp.2d at 276-77) (footnote omitted).

The quoted section from *Calderon* includes the following rationale:

The point is particularly important in Social Security appeals because the District Court is never called upon to address issues resolved in the claimant’s favor; the claimant obviously cannot challenge such determinations, and the Commissioner cannot challenge them because they were made by him (or his delegate) in the first place.

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2 *Id.* at *17-*18 (*quoting Calderon, supra*, 683 F.Supp.2d at 276-77) (footnote omitted).

3 The Court finds this rationale to be persuasive.

4 Defendant correctly points out that *Almarez* is not binding on this Court, and is not
5 controlling authority. However, the reasoning therein nevertheless persuasively
6 demonstrates the error in allowing the ALJ to revisit the favorable conclusion that
7 plaintiff was disabled as of March 21, 2011 following remand of this matter. Therefore,
8 the Court finds it to be persuasive.

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10 Therefore, for the reasons discussed, the Court is persuaded that it was erroneous
11 for this Court to indicate that the ALJ in this matter may alter his previous conclusion that
12 plaintiff was disabled as of March 21, 2011. This conclusion by the ALJ was favorable to
13 plaintiff; was not appealed by plaintiff or timely revisited by defendant; and does not
14 need to be revisited in order to address the dispositive issue raised by plaintiff and found
15 persuasive by this Court, *i.e.*, that the ALJ must call on the services of a medical expert to
16 determine if plaintiff's onset date of disability can be gleaned to be prior to March 21,
17 2011. *See* 20 C.F.R. § 416.1469(a); *see also* 20 C.F.R. § 404.989.

18 Finally, the Court concludes that *DeLorme v. Sullivan*, 924 F.2d 841 (9th Cir.
19 1991) is distinguishable from the matter presented herein because, as noted by plaintiff,
20 in that case, "the plaintiff never was found disabled at all by the ALJ" (*see* ECF No. 21,
21 p. 4 (*DeLorme, supra*, 924 F.2d at 843, 845)). In addition, in *DeLorme*, the emphasis on
22 the requirement that an ALJ procure "all evidence which is available to make the
23 determination" particularly was important due to a failure by the *DeLorme* ALJ to
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adequately develop the record regarding mental health treatment records which might have established disability. *Id.* at 844, 848. Therefore, *DeLorme* is not binding precedent on the issue currently before the Court. *See id.*

2. Whether or not plaintiff's protective filing date was erroneously determined by the ALJ and whether or not plaintiff's protective filing date for his Title XVI application should be January 20, 2009, the date his Title II application for benefits was filed.

Although the Court declined to address the issue of plaintiff's protective filing date previously due to a finding that a different issue was dispositive, such dispositive finding does not preclude necessarily the Court from ruling on plaintiff's protective filing date. For this reason, and because the Court herein concludes that the ALJ erred with respect to plaintiff's protective filing date, this issue will be discussed herein.

As noted, plaintiff initially filed an application for Title II benefits on January 20, 2009 (Tr. 222). At the time of his first hearing on February 24, 2011, the ALJ continued the hearing to allow plaintiff to file a Title XVI application (Tr. 52-53, 199). On March 7, 2011, plaintiff sent his Title XVI application to ODAR (Tr. 199-220).

As noted by plaintiff, pursuant to 20 C.F.R. § 416.340, "the Commissioner states it will use a written statement expressing intent to file a Title XVI application as a protective filing date" for the Title XVI application (ECF No. 16, p. 6 (*citing* 20 C.F.R. § 416.340 (2014))). According to the relevant federal regulation, in order for a written statement to be utilized to protect a claimant's filing date, certain requirements must be met. *See* 20 C.F.R. § 416.340. The requirements for a claimant's writing to be used to protect the filing date consist of the following:

- 1 (a) The written statement shows an intent to claim benefits
- 2 (b) You signed the statement.
- 3 (c) An application form signed by you is filed with us within 60
- 4 days after the date of the notice we will send telling of the need to file
- 5 an application.
- 6 (d) (1) The claimant is alive when the application is filed on a prescribed
- 7 form, or

8 20 C.F.R. § 416.340.

9 The issue herein is the protective filing date of plaintiff's Title XVI application for
 10 benefits. Because plaintiff initially filed an application for Title II benefits on January 20,
 11 2009 (*see* Tr. 222), plaintiff contends that his Title II application serves as a written
 12 statement indicating an intent to claim benefits (*see* ECF No. 16, p. 6). Plaintiff also
 13 contends that his Title II application "serves as a signed statement and meets the second
 14 requirement" (*see id.*). Additionally, plaintiff argues that the ALJ's notice given to him at
 15 his first hearing on February 24, 2011 constitutes notice telling him of the need to file an
 16 application for Title XVI benefits (*see id.*). Plaintiff also notes that his Title XVI
 17 application was sent to ODAR on March 7, 2011, within 60 days of said notice (*see* Tr.
 18 199-220). Finally, plaintiff notes that he still is alive (*see id.*).

19 Defendant does not contest that any of these criteria are met (*see* ECF No. 17, p.
 20 3-4). For this reason, and because plaintiff's argument is persuasive, the Court concludes
 21 that the ALJ erred by not utilizing the date of plaintiff's Title II application as a
 22 protective filing date for his Title XVI application.

23 Therefore, following remand of this matter, pursuant to federal regulation, the
 24 protective filing date for plaintiff's Title XVI application is January 20, 2009. *See* 20
 C.F.R. § 416.340.


CONCLUSION

The Court hereby **ORDERS** that this matter is **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further proceedings consistent with this Amended Order.

The Court's Order is amended to reflect that plaintiff's protective filing date for the Title XVI application following remand of this matter is January 20, 2009.

The Court's Order also is amended to reflect that remand of this matter is limited to the question of whether or not disability can be established with assistance from a medical expert prior to March 21, 2011, as disability at least as of that date already has been determined by the Administration.

Dated this 22nd day of August, 2014.

A handwritten signature in black ink, appearing to read "J. Richard Creatura", written over a horizontal line.

J. Richard Creatura
United States Magistrate Judge